UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 152

Docket No. DC-0831-09-0852-I-1

John Perez Peraza,

Appellant,

v.

Office of Personnel Management,

Agency.

July 22, 2010

John Perez Peraza, Chapel Hill, North Carolina, pro se.

Kristine Prentice, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of the initial decision that reversed its reconsideration decision denying the appellant's request to revoke his election of a survivor annuity for his spouse. For the reasons set forth below, we GRANT OPM's petition, VACATE the initial decision, and REMAND the appeal to the regional office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant retired from his position with the Social Security Administration (SSA) on January 3, 2007, under the Civil Service Retirement System (CSRS). Initial Appeal File (IAF), Tab 3, Subtab 2d at 8. At the time of his retirement, he elected a reduced annuity with the maximum survivor annuity for his wife. *Id.* at 6. It is undisputed that prior to making his election, the appellant was informed verbally by an SSA Benefits Specialist and at least one OPM official that he could cancel his annuity election up to 18 months after retirement. IAF, Tab 1; Tab 5 at 4; Tab 8 at 4-7. It is further undisputed that the appellant relied on these representations in making his election. *Id.*

¶3 On July 1, 2008, the appellant requested to cancel his election of a spousal survivor annuity. IAF, Tab 1; Tab 3, Subtab 2d at 3. OPM issued initial and final decisions denying his request as untimely because it was not made within 30 days of the appellant's receipt of his first monthly annuity payment on June 1, 2007. *Id.*, Tab 3, Subtabs 2a, 2c. The appellant filed a Board appeal and initially requested a hearing, but later withdrew the request. *Id.*, Tabs 1, 6. Based on the written record, the administrative judge issued an initial decision that reversed OPM's final decision, applying the doctrine of equitable estoppel. *Id.*, Tab 10 at 8, 14. The administrative judge determined that OPM was estopped from enforcing the 30-day deadline for cancellation of a survivor annuity because SSA and OPM officials engaged in affirmative misconduct, *id.* at 11-12, and the appellant reasonably relied on the information they provided, *id.* at 8-9.

¶4 OPM has filed a petition for review asserting that the administrative judge erred in finding that government officials engaged in affirmative misconduct, rather than mere negligence, and therefore in holding that equitable estoppel applied. PFR File, Tab 1 at 9, 15. OPM also argues that the appellant did not reasonably rely on the verbal information he received from the government officials. *Id.* at 16. The appellant has responded in opposition to OPM's petition for review. *Id.*, Tab 2.

ANALYSIS

¶5 Under the CSRS, the surviving spouse of a retired federal employee is entitled to an annuity equal to 55 percent of the retiree's annuity unless the survivor consented in writing to receive no such survivor annuity or a reduced annuity at the time of the employee's retirement. 5 U.S.C. §§ 8339(j)(1), 8341(b)(1); *Luten v. Office of Personnel Management*, 110 M.S.P.R. 667, ¶ 10 (2009); 5 C.F.R. § 831.614. OPM has promulgated implementing regulations that provide a 30-day window, after the retiree's receipt of the first regular monthly annuity payment, in which the retiree "may name a new survivor or change his election of type of annuity" by filing a new written election, with spousal consent, if applicable. *Blaha v. Office of Personnel Management*, 106 M.S.P.R. 265, ¶ 7 (2007); 5 C.F.R. § 831.621. The relevant statute and regulations also provide that a retiree may, within 18 months after retirement, choose to elect a survivor annuity for the spouse to whom he was married at retirement if he did not previously do so or to increase the size of such an annuity. 5 U.S.C. § 8339(o)(1); *Nunes v. Office of Personnel Management*, 111 M.S.P.R. 221, ¶¶ 10-11 (2009); *Thomas v. Office of Personnel Management*, 72 M.S.P.R. 77, 79 (1996); 5 C.F.R. § 831.622(b)(1). However, the retiree "may not revoke or change the [survivor annuity] election or name another survivor later than 30 days after the date of the first regular monthly payment" with certain exceptions not relevant here. 5 C.F.R. § 831.622(a); *see Nunes*, 111 M.S.P.R. 221, ¶ 13; *Thomas*, 72 M.S.P.R. at 80.

¶6 In this appeal, it is undisputed that the appellant received his first regular monthly annuity payment on June 1, 2007, and made his request to revoke his spousal survivor annuity election on July 1, 2008. His request was filed 1 year after the 30-day deadline had elapsed and was, therefore, untimely.

¶7 The Board, however, has recognized three bases for waiving a filing deadline prescribed by statute or regulation: (1) the statute or regulation may provide for a waiver under specified circumstances; (2) an agency's affirmative

misconduct may preclude enforcement of the deadline under the doctrine of equitable estoppel;[1] and (3) an agency's failure to provide a notice of rights and the applicable filing deadline, where such notice is required by statute or regulation, may warrant a waiver of the deadline. *Scriffiny v. Office of Personnel Management*, 108 M.S.P.R. 378, ¶ 6 (2008), *overruled on other grounds by Nunes*, 111 M.S.P.R. 221, ¶ 15; *Blaha*, 106 M.S.P.R. 265, ¶ 8; *Speker v. Office of Personnel Management*, 45 M.S.P.R. 380, 385 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991) (Table), *and modified by Fox v. Office of Personnel Management*, 50 M.S.P.R. 602, 606 n.4 (1991).

¶8 In this appeal, the administrative judge correctly held that neither basis (1), nor (3), for waiving a filing deadline prescribed by statute or regulation is applicable. That is, the relevant statute and regulations do not provide for waiver, and OPM did not fail to provide a required notice of rights and the applicable filing deadline.[2] The dispositive issue, therefore, is whether the appellant established basis (2), equitable estoppel, in order to waive the filing deadline.

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[1] On petition for review, OPM also argues that the appellant cannot prevail under *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). PFR File, Tab 1 at 9, 17-18. *Richmond* holds that estoppel against the government cannot result in the payment of money not otherwise provided for by law. 496 U.S. at 416, 434. However, the appellant is permitted by law to elect either a self-only annuity (with consent) or a reduced annuity with spousal benefits. *See Nunes*, 111 M.S.P.R. 221, ¶ 18 (equitable estoppel would not result in the unlawful expenditure of funds where the appellant sought to reduce his annuity to provide a survivor annuity); *cf. Snyder v. Office of Personnel Management*, 463 F.3d 1338, 1344 n.1 (Fed. Cir. 2006) (Senior Circuit Judge Plager, concurring) (*Richmond* is not a barrier to an award of a survivor annuity to a former spouse, despite a defective divorce decree, where OPM had erroneously and repeatedly stated in writing that the decree provided for the annuity).

[2] While OPM has an obligation to notify annuitants annually that they have 18 months after retirement to provide or increase a spouse's survivor annuity, there is no such requirement with regard to the 30-day deadline to revoke the annuity. *See Nunes*, 111 M.S.P.R. 221, ¶ 13.

¶9 The Board's reviewing court has held that "affirmative misconduct is a prerequisite for invoking equitable estoppel against the government[.]" *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000). In addition, to invoke equitable estoppel against the government, the party claiming estoppel must have reasonably relied on the other party's misrepresentation to his detriment. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). Thus, there are two elements that must be shown to prove a claim of equitable estoppel, affirmative misconduct and reasonable reliance on that misconduct. *See Nunes*, 111 M.S.P.R. 221, ¶ 19; *Blaha*, 106 M.S.P.R. 265, ¶ 11.

¶10 The appellant averred that he and his wife spoke with the SSA Benefits Specialist three times in order to understand if and when he could revoke his election of a survivor annuity for his spouse. IAF, Tab 8 at 5; *see also* Tab 5 at 4. He further stated that the SSA official assured them each time that he had an 18-month period in which to effect a revocation. *Id.* In addition, the appellant stated three separate OPM officials to whom they spoke said he had 18 months to revoke the annuity election. *Id.*, Tab 5 at 4; Tab 8 at 5. The undisputed evidence establishes that the appellant was misinformed by SSA and OPM officials.[3] However, the appellant did not allege or present evidence to show that the officials who provided misinformation to him knew that the statements they made were inaccurate. The Board has held that negligent provision of misinformation does not constitute affirmative misconduct. *Nunes*, 111 M.S.P.R. 221, ¶ 19;

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[3] OPM argues on petition for review that the administrative judge, who relied on the appellant's sworn pleadings regarding these events, erred in doing so and thus misconstrued the facts. PFR File, Tab 1 at 5-6. OPM raises this argument for the first time on petition for review, however. OPM did not provide any evidence or argument before the administrative judge challenging the appellant's statements that he was given misinformation on multiple occasions by SSA and OPM officials. Therefore, we do not consider OPM's argument in reaching our decision. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence).

Scriffiny, 108 M.S.P.R. 378, ¶ 12 (adopting the rule stated by the First, Sixth, Seventh, and Ninth Circuit Courts of Appeal). Therefore, the administrative judge erred in applying equitable estoppel, because the evidence did not show that the relevant government officials in this case knew they were providing the appellant with inaccurate information.

¶11 However, as in *Nunes* and *Blaha*, the parties in this appeal were never informed of the correct standard for establishing equitable estoppel. *See* IAF, Tabs 2, 4, 6; *Nunes*, 111 M.S.P.R. 221, ¶ 19; *Blaha*, 106 M.S.P.R. 265, ¶ 11. Indeed, during the prehearing conference, the administrative judge who was initially assigned to this case directed the appellant to explain "who provided him with incorrect information concerning the deadline for canceling his election, what they specifically told him, and when." IAF, Tab 6 at 1. The administrative judge directed OPM's representative to submit evidence "which would show exactly what information the appellant was provided concerning his right to cancel his survivor election, and the time limits for doing so." *Id.* Thus, it appears that the administrative judge may have inadvertently misled the appellant into believing that he could prevail merely by showing that government officials gave him incorrect information on which he relied.

¶12 Further, while the initial decision explained that, to prevail on a waiver request based on equitable estoppel, the appellant must demonstrate that the actions of the relevant government officials constituted affirmative misconduct, IAF, Tab 10 at 8, the initial decision did not explain that, under *Scriffiny*, the provision of incorrect information by agency officials does not qualify as affirmative misconduct absent evidence that the officials knew the information they provided was incorrect. Therefore, it appears that the appellant was unaware that, to prevail on an equitable estoppel claim, he was required to show that government officials knowingly provided him with incorrect information.

¶13 Accordingly, it is necessary to remand this appeal for further adjudication. *See Nunes*, 111 M.S.P.R. 221, ¶ 19; *Blaha*, 106 M.S.P.R. 265, ¶ 11. On remand,

the administrative judge should inform the parties of the legal standard for establishing equitable estoppel and afford them an opportunity to submit evidence and argument regarding the application of that doctrine. The parties should address whether the misinformation provided by the relevant government officials was knowing, and, thus, affirmative misconduct, or mere negligence. *Nunes*, 111 M.S.P.R. 221, ¶ 19; *Blaha*, 106 M.S.P.R. 265, ¶ 11.

¶14 Furthermore, to prevail under the doctrine of equitable estoppel on remand, the appellant must show not only that there was affirmative misconduct, but also that he acted reasonably in relying on the misinformation that he received. *Nunes*, 111 M.S.P.R. 221, ¶ 19; *Blaha*, 106 M.S.P.R. 265, ¶ 11. For reliance on another's affirmative misconduct to be reasonable reliance, the party claiming estoppel must show that he did not know nor should he have known that the information provided to him was inaccurate and misleading. *See Heckler*, 467 U.S. at 59.

> If, at the time when he acted, such party had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying upon the representation or concealment.

Id., n.10 (quoting 3 J. Pomeroy, Equity Jurisprudence § 810 at 219). On remand, the parties should address whether the appellant acted reasonably given the information available to him, including the instructions accompanying his retirement application, IAF, Tab 9 at 6, and the CSRS/Federal Employees Retirement System Handbook provided to him by the SSA Benefits Specialist, *id.*, Tab 8 at 5, 12.[4] We note that one of the appellant's submissions indicates that it was because of having read "a clause implying that the changes allowable

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[4] *See* Part 52A4.1-1, Changes of Election Before Final Adjudication, and Part 52A4.1-2, Changes of Election After Final Adjudication. The Handbook can be found at http://www.opm.gov/retire/pubs/handbook/hod.htm.

out to 18 months only included increasing the survivor benefit" that he questioned the SSA Benefits Specialist further. *Id.*, Tab 8 at 5.

¶15 On remand, the administrative judge shall also provide the appellant with a renewed opportunity for a hearing at which he can present evidence and argument regarding equitable estoppel. In his response to OPM's PFR, the appellant appears to allege that he did not make an informed decision to withdraw his request for a hearing. Specifically, the appellant states as follows:

> When Judge Hudson suggested that we eliminate hearings and confine ourselves to submitting written documents, we did not think to ask her what we would be giving up or what risks we would be taking, or to compare the two alternatives to each other, nor did she raise these possibilities or volunteer explanations.

PFR File, Tab 3 at 15. An appellant before the Board has the right to withdraw his request for a hearing; however, there is a strong policy in favor of granting an appellant a hearing on the merits of his case, and therefore, withdrawal of a hearing request must come by way of clear, unequivocal, or decisive action. *Pariseau v. Department of the Air Force*, 113 M.S.P.R. 370, ¶ 9 (2010); *Conant v. Office of Personnel Management*, 79 M.S.P.R. 148, 150 (1998). Further, the decision to withdraw a hearing request must be informed, i.e., the appellant must be fully apprised of the relevant adjudicatory requirements and options. *Pariseau*, 113 M.S.P.R. 370, ¶ 9. In light of the Board's policy in favor of granting an appellant a hearing on the merits of his appeal, it was incumbent on the administrative judge to inform the appellant of his alternatives to withdrawing his hearing request. Here, the appellant alleges that the administrative judge failed to do so, and the record does not indicate otherwise, as there is no evidence that the administrative judge apprised the appellant of his alternatives to withdrawing his hearing request. Moreover, as discussed above, the appellant made the decision to withdraw his request for a hearing without notice of the proper standard to be applied in asserting a claim of equitable estoppel. Therefore, the administrative judge should afford the appellant a hearing on

remand if he requests one. *See Blaha,* 106 M.S.PR. 265, ¶ 12 (directing the administrative judge to afford the appellant a hearing on remand if she requested one, given that her decision to waive a hearing below was made without notice of the proper standard to be applied in asserting a claim of equitable estoppel).

ORDER

¶16 Accordingly, the Board VACATES the initial decision and REMANDS the appeal for further adjudication consistent with this Opinion and Order. On remand, the administrative judge shall apprise the parties of the proper standard for equitable estoppel and provide them with an opportunity to submit evidence and argument concerning equitable estoppel. The administrative judge shall afford the appellant a hearing on remand, if he requests one, given that the appellant's decision to waive a hearing below was made without notice of the proper standard to be applied in asserting a claim of equitable estoppel.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.